

BOOK REVIEW

The Lofty Goals of Writing Complete History

A HISTORY OF ALTERNATIVE DISPUTE RESOLUTION: THE STORY OF A
POLITICAL, CULTURAL, AND SOCIAL MOVEMENT

(Jerome T. Barrett, with Joseph P. Barrett). San Francisco, CA:
Jossey-Bass, 2004. \$40.00 (hardcover).

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I. INTRODUCTION

Undertaking to write a complete history of any movement is a lofty task. Questions of scope, depth, and inclusion place severe limits on calling any history “complete.” Further, the natures of movements such as these tend to frustrate the process of writing history; the ways in which they weave themselves in and out of various (often otherwise unrelated) portions of society make them difficult to confine within the pages of a work shorter than a text book. In attempting to complete a broadly scoped history of the alternative dispute resolution (ADR) movement, Jerome T. Barrett was faced with these difficulties. To find evidence of the difficulty Barrett had in defining the ADR movement, one need not look further than the subtitle of his work. Barrett places the ADR movement within a triad of historical-movement categories, and fails to argue the primacy of any one of them as the driving force behind the movement. While to some critics this may be seen as a form of authorial punting, it is in fact an appropriate response to the complicated and interwoven nature of the ADR movement. Perhaps Barrett’s loudest statement in regards to defining the ADR movement comes by way of exclusion, as he decided not to include “legal movement” within his title. Nonetheless, Barrett’s work comes very close to achieving the difficult goal of complete history, and, despite the difficulty of placing the ADR movement in any one category, the work should appeal to scholars and readers hailing from a myriad array of intellectual and academic backgrounds.

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II. ACHIEVEMENTS IN BREADTH

The trend among commentators attempting to outline the history of the ADR movement is to peg the beginning point much too late. Some mark that point as the (Roscoe) Pound Conference in 1976, where various scholars, including Frank Sander and Nancy Rogers, helped develop the concept of the "multi-door courthouse." Others view the ADR movement as a natural outgrowth of the various rights movements of the 1960s (including political and legal change which resulted therefrom). A select handful of scholars are willing to go back further, towards the turn of the century, and (at least partially) credit the start of the ADR movement to the federal government's creation of the United States Conciliation Service (in 1917, later known as Federal Mediation and Conciliation Services, or FMCS) to deal with increasingly important labor disputes springing from national industrialization.

Barrett's work addresses all of these events in due time. However, he chooses not to begin his history with any of them, and for good reason. While all of these events mark major chapters in the history of the ADR movement (and, not coincidentally, also mark chapters in Barrett's book), the foundations of the ADR movement go back much farther.

Philosophically speaking, there can only be an *alternative* dispute resolution movement once there is a primary form of dispute resolution to which alternatives exist. In this way, it is arguable that the ADR movement may have begun only after society's adoption of a primary form of dispute resolution (namely, the law). However, the histories of the processes which make up ADR¹ very likely predate the adoption of indoctrinated law. For example, the arts of negotiation and mediation certainly existed prior to written law, and only became alternatives once societies began adopting written law as their primary form of dispute resolution. Thus, the history of the ADR movement likely predates society's adoption of written law as its primary dispute resolution process.

Barrett's book does not address the above philosophical discussion as it sets out a starting point for the ADR movement. Nonetheless, even prior to chapter one, Barrett shows a commitment to addressing the early, pre-20th century roots of the ADR movement. For example, he includes a thorough timeline of ADR that begins with an 1800 B.C. entry relating to the Mari Kingdom's use of arbitration and mediation. In the opening chapter, he correctly pegs ADR's start point in prehistoric times with an imagined story relating to dispute resolution methods which were alternatives to violence.

¹ Namely, mediation, arbitration, and negotiation, though this is a limited definition.

The early chapters continue on to highlight traditionally untreated applications of ADR, including:

- Discussions of mediation, arbitration, negotiation, consensus building, and conciliation processes in traditional societies such as the Bushmen of the Kalahari, native Hawaiian Islanders, the Kpelle of Central Liberia, the Abkhazian of the Caucasus Mountains, and the Yoruba of Nigeria.
- The use of processes similar to modern ADR by early civilized societies, including the extensive use of mediation in ancient China, Greek reliance on arbitration, the traditional Jewish processes of *biztua* (mediation) and *p'sharah* (arbitration), Biblically-based Christian and papal peacemaking and international mediation, and Muslim *tahkim* (arbitration).
- The rise and prominence of European commercial arbitration practices referred to as "the law merchant," and the spread thereof during the Age of Discovery.
- Use of arbitration and mediation as a form of diplomacy, from early Mari kings to Ben Franklin, John Adams, and Thomas Jefferson.
- The nuances of negotiations in early American history, including dealings with Native Americans, the drafting of the Constitution, slavery compromises, and ending the Civil War and World War I.

In light of Barrett's almost exclusive focus on the United States in the later portions of the book, it is unfortunate that he did not more fully address the use of mediation and tribal justice methods used by Native American tribes in this early section. Barrett briefly mentions dealings with tribes (solely from a Eurocentric point of view), and does point out that modern ADR vocabulary includes words borrowed from Native American dispute resolution (*powwow* and *caucus*), but he does not give tribal dispute resolution the discussion it deserves.

Nonetheless, given what he in fact does cover, it can fairly be stated that Barrett spends a substantial portion of his work paying homage to periods of history traditionally untreated by ADR commentators. Though ADR would spring into more legally-mainstreamed use in the latter half of the 20th century, providing an earlier history, as Barrett does, allows an interested reader to see that the movement did not spring out of the ether, but rather encompassed solidly developed concepts and applications dating to the beginning of recorded time, and probably earlier.

III. SHORTCOMINGS OF THE MODERN TREATMENT

One of the biggest problems with Barrett's work is that once it moves away from the important early histories, it almost completely ignores non-American ADR. The work begins to focus primarily on the labor movement within the United States, and ADR responses (especially arbitration) to disputes arising therefrom. Perhaps this is natural given Barrett's expertise in this field.² The sections relating to labor arbitration and mediation in the middle portions of the twentieth century *are* extremely thorough and interesting, including both concrete histories and entertaining personal observations of the author. Barrett made no mistakes here with what he *did* include in the book. Rather, the inadequacies lie in the exclusion of much discussion of mediation or arbitration, both in the labor context and elsewhere, outside U.S. borders. It would certainly have been interesting, for example, to hear what happened to long-accepted Chinese mediation practices after the People's Revolution, the rise of communism, and the formation of the People's Republic of China.

Barrett does thoroughly discuss American ADR, especially the initiatives undertaken by government actors, including:

- The federal government's response to labor turmoil in creating the FMCS and a thorough history of that program.
- Various federal and state legislation relating to and encouraging arbitration in the labor setting.
- Presidential attitudes toward ADR, from Woodrow Wilson through George W. Bush.
- Community Relations Service (created by President Lyndon Johnson's Civil Rights Act of 1965) mediation as a response to the Civil Rights movement.

² Barrett's degrees include a Doctorate in Human Resource Development from George Washington University and a Masters in Industrial Relations from the University of Minnesota (he also earned a Bachelor's degree in Social Science from the College of St. Thomas). His professional activities relating to the labor field include being an Associate Professor and Director of Labor Relations at Northern Kentucky University; Chief of the Division of Public Employee Labor Relations at the U.S. Department of Labor, Field Examiner for the National Labor Relations Board, teacher of labor-management relations in 19 countries, and member of the Industrial Relations Research Association. It should also be noted that Barrett has a background as a mediator, including functioning as Director of Preventive Mediation for the Federal Mediation and Conciliation Service (FMCS) and as a practicing mediator for FMCS and the Minnesota Bureau of Mediation. *Biographical Information for Dr. Jerome T. Barrett*, available at <http://www.adrplus.org/jbar.htm> (last visited May 10, 2005).

- Environmental ADR and prisoner grievance arbitration in the 1970s.
- Various district and state courts' support of mediation, arbitration, and summary jury trial programs.

Barrett also thoroughly addresses non-governmental progress in the field of American ADR from the late 1960s through today, including:

- The formation of the Society of Professionals in Dispute Resolution (SPIDR).
- The Pound Conference.
- The formation of the American Bar Association's Section on Dispute Resolution.
- The rise of the American Arbitration Association (AAA) after being founded in 1926.
- The advent of ADR curriculum in law schools, including the creation of dispute resolution-related journals at Ohio State, Missouri-Columbia, and Harvard.
- The formation of other professional organizations, such as the Academy of Family Mediators.
- The promulgation and adaptation of the Uniform Mediation Act (UMA).
- The rise of private sector mediation, including divorce, business, and on-line mediation.

Thus, Barrett's book is extremely thorough in its treatment of the modern periods of ADR development, the same periods often addressed, in much less detail, by other ADR commentators. This treatment is, however, hampered in its completeness by a lack of ADR discussion outside of U.S. borders. Despite its high-level of detail, then, the work fails in its attempt to be a complete history of the ADR movement.

IV. CONCLUSION

This book should certainly become an indispensable history for those seeking detailed discussion of pre-20th century ADR processes. It also will find its place among the best historical treatments of modern American ADR histories. However, there is a strong disconnect felt in reading the book, perhaps created by these two strong points. The breadth and depth of the early, pre-modern history section makes the modern, Amero-centric section feel minute in scope, and lacking in international flavor. At the same time, the microscopically detailed portions of the modern history section, particularly those relating to labor, makes the pre-modern history section look as if it were somewhat neglected by the author. Perhaps this book would

better have functioned as two separate pieces, or perhaps an internationalizing of the modern-section combined with more detailed treatments in the pre-modern section would give the work a more complete feel. Either way, Barrett set out the lofty goal of creating a complete history of the ADR movement. Though he certainly falls short of achieving this goal, his audience can learn an extensive amount about the ADR movement in reading this work. Thus, it may fairly be termed that this book is only a failure to its own ambition; it is packed with valuable history and important commentary on the ADR movement which will be used for generations of scholars to come.